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Peter Zenger's Ordeal: Historical Antecedent to a Concept of Free Press in Early Colonial America, or Is What is Past an Expanding and Somewhat Frightening Prologue to the Future

George P. Smith II
The Catholic University of America, Columbus School of Law

Peter Zenger's Ordeal: Historical Antecedent To a Concept of Free Press In Early Colonial America or Is What Is Past, an Expanding and Somewhat Frightening Prologue to the Future?

by

GEORGE P. SMITH II

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Dedication

I should like to dedicate this lecture to an outstanding individual who has played a unique and dynamic role in the history of Hampden-Sydney College. A man who—for fourteen years—has labored quietly in the vineyards . . . a selfless man . . . a man imbued with a true Christian spirit . . . a gentle man . . . a steward who has kept his house balanced financially in a period when other institutions of higher education have showed distinct signs of fiscal weakness . . . a man who, during this fourteen year period, increased the size of his faculty both from a qualitative and quantitative standard and sought the same within the student body . . . a steward who doubled the endowment, increased faculty salaries and constructed six new buildings. My recitation of the record could go on; but those of you here this evening know full the richness of this man's accomplishments. His quiet, unassuming dignity has masked all too often yeoman service to his state, his church, his college and his nation. I know all of you join me in paying tribute to Dr. Taylor Reveley, the President of Hampden-Sydney College and thanking him for caring.

Upon reflection, however, I believe that a second thank you is in order to a person whose devotion, loyalty, charm, and grace have combined with strength of character to underscore the work of President Reveley. *Behind* every great man, it is said, stands a great woman. But—in the case of Marie Reveley—the First Lady of Hampden-Sydney College, I think it would be proper to acknowledge her support of Dr. Reveley as an equal partner *at his side* instead of one behind him. Together, as a team, they have accomplished much—and we can all expect even more from them in the years ahead.

Dr. Reveley, Mrs. Reveley, please accept the dedication of this lecture to you as my modest way of expressing my thanks for your good work.

"Give me liberty to know, to utter and to argue freely according to conscience — above all liberties."

John Milton, "Areopagitica."
A Speech for the Liberty of
Unlicensed Printing to the
Parliament of England, 1644.

Peter Zenger was born in Germany in 1697 and emigrated to the New World in 1710 with his family. That same year he was apprenticed to William Bradford—the only printer working in New York—and reputedly one of the best in the Colonies. For eight years, Zenger served his indentures with Bradford.

From 1719-22, he journeyed through the Colonies—searching for a place to develop his business. During this time, he married and a son, John, was born. Perhaps Peter Zenger's most ambitious venture during this period was his trip to Maryland where he became a citizen and was granted the right to publish the Colony's laws and proceedings. What followed is somewhat uncertain: it could well have been that his plans for his business did not work out—or, the death of his wife may have been determinative in leading him to a decision to forego the development of his new career in Maryland and return to New York. In any event, he did in fact return to New York and—upon this return—re-married.

In 1725, he formed a brief partnership with William Bradford. The partnership relationship failed and the next year Zenger went into business for himself—thereby becoming the second printer in New York and the first rival of his former master.

There were sufficient business opportunities in New York to accommodate two printers. Bradford, the official printer, worked for the Governor, the Council and the Assembly. He carried the title of the King's Printer for the Province of New York. Although characterized as honest, Bradford was understandably reluctant to jeopardize his position by print-

ing anything which might be offensive to his patrons. This, interestingly, was exactly where the free-spirited, entreprenurial Zenger came in. Proprietor of a second-class printing shop, cut off from government work, he could maintain his business operations by taking the trade of New Yorkers who had some motive for avoiding the official press— and especially those who were dissatisfied with the situation in either Church or State and wanted to say so. For six years, he supplemented his staple output (mainly religious tracts) with critical pamphlets and open letters. Gradually, the logic of his predicament pushed him into the position of "official" printer to those writers whose material Bradford could not, or would not, print.

Such was Zenger's status in the Fall of 1732 when affairs in New York began to boil up into a political crisis that first involved him as a partisan in a duel of contending factions, and ultimately landed him in jail.[1]

Before continuing, it should be stressed that half a dozen other men were of more consequence than Peter Zenger in the establishment of a free press in New York. He was, as noted, neither the editor of his newspaper nor even a principal writer for it during its great days; his function hardly went beyond that of the mere printer. He became famous almost by accident—famous, in the final analysis—as a symbol rather than as a motivating force. Viewed in this context, his ordeal was not so much a precedent, but a re-enforcing antecedent to strengthening a new-found, relatively untested embryonic concept of free press in early colonial America.

I.
The Political Crisis—The Beginnings

William Cosby became Governor of New York in August, 1732. Considered quick tempered, unlettered, jealous, haughty and greedy, he set in motion a series of political events which climaxed with John Peter Zenger's ordeal.

The precipitating cause for political dissension was found in a dispute arising over money—and more particularly the salary of a gentleman named Rip Van Dam. Van Dam, as senior member of the provincial Council, succeeded to the Chief Executive position in the state after the death of Cosby's predecessor. Custom dictated that he set aside half of his salary for the incoming Governor—in this case, Cosby. Upon his arrival, Cosby claimed his share. Van Dam, however, refused to part with the money unless Cosby gave him, in return, half the perquisites of the Governorship. As might have been expected, Cosby refused to accept the bargain and—thereupon—called upon the Supreme Court, the members of which were his appointees, to sit as a Court of Equity. No such court had sat in New York for quite some years. Although technically empowered to sit in this capacity—with precedent fully supporting such a direction—popular opposition to this constitution by the Court existed. New Yorkers preferred legal proceedings based upon the Common Law and legislation instead of Equity which relied, for its direction, upon concepts of Justice and the discretion of the judges who determined cases without benefit of a jury.

In April, 1733, Van Dam's case was heard by the three judges of the Supreme Court—with Chief Justice Lewis Morris presiding. Van Dam argued against the equity jurisdiction of the Court. His plea was considered much more than a simple attack on the jurisdiction of the Court, however. It was—rather—a direct accusation that Governor Cosby had overstepped the limits of his authority and, thus, had violated the law. The Chief Justice agreed with Van Dam's argument. The other two justices, James Delancey and Frederick Philipse, found for the Governor. Thereupon, the Chief Justice issued a stinging denunciation of his colleagues and of the Governor and went on to publish his remarks through the Zenger press. When Governor Cosby learned of Morris' opinion in the case, he was outraged and dismissed him from the High Court and raised Justice Delancey to the Chief Judgeship.

Lewis Morris was a skilled politician and a man of considerable wealth. He and his son ran for the New York Assembly in October and November in 1733 and were elected—despite strong efforts by Governor Cosby to prevent the election victory. Morris and his supporters joined forces with Rip Van Dam and began to develop a new political attack of the Governor based upon the earlier salary dispute and the alleged jurisdictional over-reaching by the Supreme Court of its equity powers. Indeed, by 1734, the Morris supporters popularly called "Morrisites"—and termed loosely by some as a political party—formalized their political program as one advocating the impartial administration of justice, the independence of the three branches of the provincial gov-

ernment, the appointment of qualified and genuinely local officials and the protection of private property rights.

Cosby responded by asserting the Morrisites promoted sedition, disturbance of the public peace and endangered order and government.

The Morris Party—by 1734—had gained notable success in the local elections in Westchester and New York City; but outside of these two areas had little acceptance. In order to proselytize its cause and gain a wider popular base of support in opposition to the Governor, the Party launched a newspaper—*The New York Weekly Journal.* It also detailed Lewis Morris, himself, to London to plead for the recall of Cosby and the reinstatement of Morris to the bench. Neither of these pleas were acted upon.

The Weekly Journal became a powerful weapon of invective and satire against Cosby. It was printed and published by John Peter Zenger, but the guiding genius or major force and most effective editor of the *Journal* was James Alexander who had unsuccessfully defended Van Dam in his previous action with the Governor and who eventually represented Zenger in his subsequent legal difficulties.

Each issue of the *Journal* contained several essays—reprinted from either English or American sources—or, on occasion, composed solely for Zenger's paper. The Morrisites often composed, under appropriate pseudonyms, letters to the editors from subscribers. The works of the two English libertarians, Trenchard and Gordon, were also of particular topicality and frequent publishing value to the *Journal.* [2]

John Trenchard and Thomas Gordon, both Whig journalists, shared the joint pseudonym, "Cato." Their political essays began to be published in 1720 in a variety of London newspapers. The broad sweep of their ideas found ready currency in the colonies. Indeed, it has been asserted by leading historians that Cato's Letters rather than John Locke's *Treatise on Civil Government* was, during the Colonial Period, the most popular source of political ideas for the American patriots and leading lawmakers; truly, the "high water mark of libertarian theory" until the conclusion of the 18th Century.[3]

The linchpin to Cato's theory of intellectual and political liberty was a concept of freedom of expression. Cato insisted that free speech was, "the Right of every Man, as far as by it he does not hurt and control the Right of another; and this is the only check which it ought to suffer, the only Bounds which it ought to know."[4] He regarded officials in the government as but trustees of the people's interest and, in such capacity, were subject to having their deeds examined by the public in an open and forthright manner. Since the public had such an interest and even right in being apprised of the truth, relative to public officials and the measures they advocated and pursued, it was Cato's contention that truth should be admitted as a defense against a charge of criminal libel. Thus, a defendant who could prove the accuracy of his allegedly seditious utterance should—in turn—be acquitted.[5]

At this juncture in its evolution, the law did not regard truth as a defense. In fact, the accepted legal theory was, "the greater the truth, the greater the

scandal against the government."[6] In libel cases, the judges—as a matter of law—reserved exclusively to themselves decision of the crucial question whether the defendant's remarks were libelous. There was no jury consideration of this point. This practice of the courts was severely condemned by Cato. Instead of attempting to find a defendant's words to be—in and of themselves—dangerous to the government's well being, Cato suggested the courts treat such undeserved libels as laughable. The prosecutions of such acts represented a serious threat to liberty. Cato observed that, ". . . I would rather many libels should escape, than the liberty of the Press should be infringed . . ."[7]

II.
The Ordeal Begins

Within a short time, Governor Cosby was convinced the *Journal* was posing a real threat to the permanence of his administration. In fact, Zenger had been publishing the *Journal* only for some two months when Cosby decided that it must cease its operation.

In January 1734, Chief Justice James Lelancey requested the Grand Jury to return indictments for seditious libels which had been circulating. But, the grand jurors knew such indictments would be directed to the activities of the Zenger press; and so they refused to act. When the next Grand Jury was empaneled in October, the Chief Justice again brought up the same issue. This time he asked the jurors to present two scandalous songs printed by Zenger for indictment. The songs in question implied

Cosby was disrespectful of the law. The Jury, however, protested the information and evidence available to them did not yield the identity of the author of the song.

Governor Cosby was frustrated as a consequence of the inactivity by the Grand Jury. He next turned to the authority of the General Assembly and the New York Council to silence Zenger's press. The Governor singled out four issues of the *Journal* containing articles which tacitly accused him of treachery to the Colony and of political skulduggery. The Council concurred in the Governor's conclusion regarding the offensive nature of the four issues and thereupon requested the Assembly's agreement to an order to burn the questioned newspapers. The Assembly refused to such an agreement. The Council, consequently, acted on its own initiative and ordered the questioned issues of the *Journal* burned as seditious and proclaimed a gubernatorial reward for discovery of the authors of the articles within the issues and—furthermore—ordered the Attorney General to prosecute Zenger for printing the issues which were in controversy.

On November 17, 1734, Zenger was imprisoned and charged with not only printing seditious libels which tended to raise factions and tumults in New York, but of inflaming the minds of the people against the government and disturbing the peace.

The Morrisites were perplexed by Zenger's arrest; for they were fully cognizant that if he were to be convicted and his press silenced, their most potent weapon would be lost. They employed two prominent lawyers, James Alexander and William Smith,

as Zenger's defense counsel. In arguments before Chief Justice Delancey for a writ of *habeas corpus* which would have freed the printer on bail, the lawyers were unsuccessful in arguing for a moderate bail of *L*40 pounds. The Chief Justice set the bail at *L*400 pounds and thus forced Zenger to remain in jail for some eight months until the trial was concluded. Of course, the Morrisites could have raised sufficient funds to meet Zenger's bail, but they sought to exploit his imprisonment for its full propaganda value. Surprisingly, when the warrant for Zenger's arrest was issued, the Chief Justice carelessly observed that a jury would surely perjure itself if it found Zenger not guilty.

In an unprecedented move, Chief Justice Delancey disbarred Alexander and Smith from acting as Zenger's defense counsel. This action was precipitated because of the harsh attack launched by both attorneys on the authority of the Court to hear the case itself. Zenger's counsel argued the commissions of two of the three sitting Justices in the New York Supreme Court—Delancey and Philipse—were invalid because they were not granted with the "advice and consent" of the New York Council. Thus Alexander and Smith were, at least by implication, accusing Governor Cosby of appointing personal favorites with unlawful powers to control the New York judicial system.

Subsequently, on Zenger's petition, the Chief Justice appointed John Chambers—recognized as a competent lawyer, but in Governor Cosby's favor—to defend him. Zenger's friends were dubious about this appointment and, thus, engaged Andrew Hamil-

ton of Philadelphia to represent him.

When Zenger's trial was commenced August 4, 1735, and the arguments heard, it took the jury only a few minutes to find Zenger not guilty. The Prosecutor argued that the issue of libelousness of the publication was for the Court to decide. The jury was left with determining whether Zenger published the alleged libel. The Chief Justice stated the law of the case as being that the statements in issue—even though true—could nonetheless be found to be of a libelous nature; for the state, as well as the individual, had the right to protect itself from injurious criticism.

Zenger's defense, as formulated by James Alexander and argued by Andrew Hamilton, was taken in substantial part from Cato's writings. It was Cato who first popularized the idea that—against charges of criminal libel—truth should be admitted as a defense. In developing the argument that the jury should decide themselves—rather than be bound by judicial instruction—whether the defendant's (here Zenger) words were libelous, defense counsel drew not from Cato's writings, but rather from this very principle specifically enunciated by William Bradford in 1692 during his trial for seditious libel in Philadelphia.[8] Thus it is seen, that there was little of what might be regarded as original or pace-setting in Zenger's defense.

The right of citizens to criticize their rulers was perhaps the fundamental point of Hamilton's defense of Zenger. He contended that the law of seditious libel was intended to protect the King and his ministers—rather than the Governors of the colonies in America. With this argument, he chose to disre-

gard the fact that the Governors were, logically in fact, ministers of the King. The rule of law—the rule of precedent so venerated and exhalted as the cornerstone of English Law, which up to this time had been accepted in the colonies—was, according to Hamilton, not necessarily so good in the colonies. The law was, so to speak, out of step with public opinion. Hamilton won Zenger's defense by a pure and simple appeal to public opinion—for the law was totally supportive of the prosecution. The colonists, so argued a passionate Hamilton, had no other recourse for seeking effective redress of a tyrannical Governor than the freedom of public criticism. He chose to disregard the proper remedy for colonial injustice at that time which was a complaint to England as being ineffective.[9]

Cosby died in early 1736. Within but a few years after Zenger's trial, the Morrisite Party ceased to exist. To be stressed is the fact that Zenger's acquittal marked a significant political victory for a specialized interest group—the Morrisites—which was but a popular political faction neither representing "popular freedom" nor "the popular cause."

Before I set about the development of a commentary on the role of the press in the modern political arena, I would like to amplify certain principles of the law of defamation.

III.
Defamation

When we speak of defamation, we speak of two legal wrongs or offenses—libel and slander. Libel, of course, is written defamation and slander is oral. Be it

either libel or slander, defamation is regarded as an invasion of the interest in reputation and good name. Imbedded in the legal recognition of the offense or wrong of defamation, is what is commonly regarded as a "relational interest"—since vindication of this legal right involves the opinion which others in the community may have, or tend to have, of the plaintiff or wronged party. Accordingly, to recover for defamation, something must be communicated to a third person that may affect that community opinion relative to the wronged or defamed party.

Derogatory words and insults directed to the plaintiff or defamed person himself may afford ground for an action for the intentional infliction of mental suffering; but unless the words and insults are communicated to another, the action cannot sound in defamation—no matter how harrowing they may be to one's feelings.

The law of defamation is often regarded as a vexatious conundrum, for it contains anomalies and absurdities which create havoc both to the lawyer preparing a case grounded in this principle and to the judge or jury charged with adjudicating the matter.

The ecclesiastical courts long regarded defamation as a sin and met out punishment for it with various penances. Once these courts lost their power, the sixteenth century witnessed a slow, but nonetheless perceptible, infiltration of actions for slander in the civil, non-church courts termed the Common Law Courts.

At the turn of the seventeenth century, the Court of the Star Chamber in England took independent jurisdiction of crimes of political libel in order to sup-

press what were considered seditious publications which had come into prominence and proliferation with the spread and advancement of printing. When the Star Chamber was abolished, jurisdiction over libel in turn passed to the Common Law Courts. Perceptible legal differences between libel being recognized as a civil and criminal wrong and slander only as a civil offense were recognized.[10]

A consideration of the haphazard development of the law of defamation in the colonies, and later states, far exceeds the purpose of these remarks. Suffice it to note, however, that there have been significant shifts in legal attitudes from favoring awards for defamatory imputations to character to disfavoring such awards. Today the judicial trend would appear to take a view toward a more restricted liability by defendants for their reputational wrongs against plaintiffs in such settings. The courts expect us all, as social animals, to be willing to accept more unpleasantness from others in our day to day relationships. The courts are telling us to be less sensitive to the vicissitudes of life.

A defamatory communication usually has been defined as one which tends to hold the plaintiff up to either hatred, ridicule, or contempt or one which causes him to be shunned or avoided. This definition instantly appears as one which is exceedingly narrow—since an imputation of sanity, poverty, or even an assertion that a woman was raped—which, under normal circumstances—would likely arouse only pity or sympathy in the minds of decent and ordinary people, have been held to be defamatory. To be more precise, defamation is that which tends to

injure "reputation" in the popular sense. Defamation diminishes the esteem, respect, goodwill or confidence in which the plaintiff or wronged party is held. It promotes adverse, derogatory or unpleasant feelings or opinions against him. In its most basic sense, defamation is tied to the idea of disgrace. Thus, a statement made regarding one's political affiliation (i.e., that one is a Republican) may quite possibly raise feelings against him in the minds of many of the opposing party (i.e., Democrats) and even diminish him in their esteem. Yet, it cannot be found in itself to be defamatory since the average, ordinary reasonable man could—under no circumstances—consider such a statement as adversely reflecting upon his character.[11]

It has been held that in the absence of special circumstances which add another meaning to the words, it is not defamatory to state that a man is dead, that he has no known permanent address, that he is a labor agitator or that he has led an eventful life. Yet, it is defamatory upon its face to say that the plaintiff has attempted suicide, that he refuses to pay his just debts, that he is immoral or unchaste or queer, that he is having "wife trouble" and is about to be divorced, a eunuch or a rotten egg or is heartless. All of these statements underscore the element of personal disgrace, lacking in the first group.[12]

One common form of defamation is ridicule. It has been held to be defamatory to publish humorous articles, verses, cartoons or carciatures making fun of the plaintiff, to print his picture in juxtaposition with an article on evolution and a photograph of a gorilla or with an optical illusion of an obscene and ludicrous

deformity—readily detected at second glance.

The question of the standard by which defamation is to be determined has given rise to some difficulty. It has been held in England that the communication must tend to defame the plaintiff in the eyes of the community in general, or at least of a reasonable man, rather than in the opinion of any particular group or class. The American courts have taken a more realistic view, recognizing that the plaintiff may suffer real damage if he is lowered in the esteem of any substantial and respectable group, even though it may be quite a small minority.

The law presumes that all defamation is false. It remains for the defendant to meet the obligation or burden of pleading and proving its truth. This justification must be as broad, and as narrow as the defamatory imputation itself. He may not avoid liability by proving that the imputation was true in part, or, if the charge is one of persistent misconduct by showing that it was true in a single instance. If a defendant retracts the questioned defamatory statement, he may lessen or mitigate damages for his wrongful act—although he does not avoid his liability. Public officials and news-worthy figures are, because of the nature of their daily appearance in the public arena, held generally to a higher standard of what we might call defamatory vulnerability. In orther words, because of the nature of some persons work or associations, they give up the normal degrees of privacy which innure to average people. And, by giving up such privacy, they become—by this very act—susceptible to comments about their life and general activities which would, absent their professional or

social status of distinction or uniqueness, be otherwise closed to critical journalistic comment. Certainly, out and out defamation will still not be judicially allowed, but what is regarded by the courts as defamatory will be more relaxed and tolerant for a public and social figure than for the average non-public, non-social person.[12]

IV.
The Challenges of the Modern Press

At the moment, our country is experiencing what might well be considered a "right to know explosion" of rather epic proportion. The Freedom of Information Act and the Government Sunshine Operations Act have, at the Federal level, set the tone for activities undertaken by the central government—and the states are beginning to respond accordingly. The right to know, to be informed, has assumed dramatic proportions.

Interestingly, the men of the 18th century, who were the first in the modern world to speak of the Rights of Man (rights one inherited and could be enjoyed without effort and sacrifice) knew full well that rights were privileges and all privileges were obligations. They also knew that when a privilege was not viewed as an obligation—not earned each day and thus made self-justifying—that particular privilege would soon disappear.

The freedom of the press is one of the Rights of Man. Smug publishers and newspaper executives stress this time and time again. They tell each other with a sense of tireless self-satisfaction that this freedom is one of the bulwarks of man's liberties. Yet,

one seldom—if ever—hears of the heavy burdens and obligations this freedom imposes upon them in turn.[13]

The basic reason that newspapers enjoy the freedom that they do is because the people who buy newspapers are not the people newspapers write about. It is the unknown man in the street who wants the truth—about not only his neighbors, but about his boss, his various governments, and about the world beyond the boundaries of his country. It is *his* interest in the truth that sustains the journalist who has a sincere interest in telling it.[14]

Today, in England, no equivalent to our First Amendment guarantees of free press exist. The Official Secrets Act, for example, makes illegal the unauthorized dissemination of any government document—no matter how trivial. Public figures are allowed far greater degrees of privacy and, thus, damages for the invasion thereof, than in the United States. Journalists are liable to being jailed for reporting on matters which are *sub judice* or before the court currently.[15]

As early as 1814, Thomas Jefferson—who initially recognized the value of a free press—observed nonetheless that the newspapers had passed into a putrid state and that the journalists of the day were possessed of a malignant, vulgar and mendacious spirit.[16]

The Zenger judicial confrontation—and those which both preceded it and followed subsequently—bore witness to what has enabled the press today to assume characteristics of the legendary Jabberwock bird: forever consuming and in-

truding with "jaws that bite and claws that catch." Thus, current facts paint an all too clear and convincing picture of a past history which has expanded and continues to expand into a bold and, indeed, somewhat frightening prologue to the future.

Modernly, the role of the press in developing political attitudes and advancing those attitudes has become in some cases far too vigorous of a role.

Switching from a blatantly suspicious and acrimonious style of reporting during the Nixon-Agnew days, more recently the press has developed during the recent presidential elections a form of cynicism, disdain and plague-on-both-your-houses impartiality which has been considered a contributing factor to the public's mood of ambivalence. As Thomas Griffith recently observed, "Looking back on many of the 'issues' that dominated the headlines—ethnic purity, the *Playboy* interview, Clarence Kelley's valances, the Eastern Europe gaffe, Ford's finances—it's hard to escape the feeling that the press coverage has a lot to answer for. In the pack mentality of campaign journalism, once some characteristic in a candidate is spot-lighted—Carter's fuzziness, Ford's fumbling—it is endlessly insisted on. In *Playboy,* Carter noted that local newmen often asked him good questions on the issues, 'but the traveling press have zero interest in any issue unless it's a mistake. What they're looking for is a 47-second argument between me and another candidate or something like that.' "[17] All too regretably, what is thought to be the leading newspaper in the country, *The New York Times,* has not been fulfilling its motto: "All the News That's *Fit* to Print."

Again, during coverage of recent state, local, and national political campaigns, the aura of mathematical precision that the methodology of polling simply does not justify, was nonetheless constantly emphasized. Weeks before the polls were open, so-called sophisticated sampling techniques were employed to reveal what would happen on the actual election day. Just pause and think for a moment of the impact the repetitive emphasis such poll reporting has on the average citizen trying to evaluate both sides of the issues and the candidates themselves in order to choose whom he believes will be, in the final analysis, the best qualified person. If the polls predict Candidate A is going to win, I want to back a winner and have my vote count; so, the average uninformed voter may conclude, "I'm for candidate A"—without ever having studied A and B as *candidates* rather than statistical declarations.

All of us are—I think—guilty of not fulfilling our obligations as informed members of society to read various publications or, for that matter, everything we can find available to us in attempting to truly know a candidate and his campaign platform. We are often too tired to read more than one local newspaper, maybe TIME Magazine and listen to a nightly news program on radio or television. Yes, all too regretably, we have fallen prey to the humorist, Will Rogers' statement, that "All I know is what I read in the papers." The right of opinion, as Jefferson termed it, should be formed freely from a variety of sources. It should never suffer invasion and domination by one controlling force. [18]

Intellectual discussion of current political and

social matters is quite often precluded simply because people are too sensitive or, shall I say unsophisticated, to discuss such matters rationally among friends and colleagues.

All too often differences of opinion are exaggeratedly taken as differences of principle.[19] I know that in the Mid-West where I grew up, one was often cautioned: "If you want to remain my friend, don't discuss religion, politics, or sex." Being precluded from discussing ramifications of these three life forces meant the power of the press was even more a forceful and significant power than it would be normally. It assumed the proportion of "Sacred Writ!" Prohibitions of topical areas of conversation also meant many a dull evening was spent—especially in the Summertime on a hot evening when friends and neighbors would sit on their front porches—discussing such timely matters as the number of fire flies out that evening, the tartness of the lemonade, the latest fatalities in the local newspaper's obituary column, and the intolerable heat.

With the fall of President Nixon, promoted in very large part by *The Washington Post's* so-called "investigative reports," these types of off-the-record stories from unnamed sources in the Watergate tradition have appeared in all the media and resulted in the publication of some highly speculative reportage of dubious origin and creditability.[20]

Benjamin Bradlee, Executive Editor of the *Washington Post* newspaper, recently acknowledged that newspaper-journalists have intruded into areas of investigation where they should not be, simply because the authorities charged with regulation in the

first instance had shirked their responsibilities. When Congressional Hill bureaucrats, administrative agencies, and executive officers in the government fail to police themselves within their own ethical standards, the press is duty-bound to step in and fill the vacuum of non-responsiveness. The press, by its action, then, becomes a type of "folk hero." It and its reporter-journalists are glamorized in books, movies, television dramas, and talk shows. And, in turn, they become the center of the news attention rather than a conduit focusing the attention on the events on which they report.[21]

The newspaper-journalist is the central figure in the daily search for truth. It is he who scripts the events that would be devoid of popular interest if left totally to an unthinking, unresponsive television camera.

It is a constant wonderment to me to read of how the three major television networks—ABC, CBS and NBC—compete constantly with one another for news reporting ratings. News is News no matter how it is presented. Each night the commercial networks give us exactly what we would get on a radio except for the pictures and visual presence of an anchorman. A picture may be worth a thousand words, but without the written word to describe and interpret it, it has no news coverage value as a translated occurrence.

The impact of CBS's Walter Cronkite—a man regarded as everybody's uncle—"the most trusted man in America," in reporting the news is incalculable. A dramatic pause, raised eyebrow, or turn of the head can all be used to signal to the television viewer

a cue or induced response that "Uncle" Walter approves or disapproves of the significance of a particular news event. For the captive, unthinking viewer, it is oh-so-easy to be TOLD the significance of a particular news happening.[22]

Because of an over zealous and injudicious article concerning the Central Intelligence Agency published in a British tabloid, wherein a list of names purported to be CIA agents operating in Britain was set out, an American investigative reporter living in London who wrote the article was asked to leave the country on the grounds that he had become a threat to national security. In December, 1975, after publication of a similar list by an English language newspaper in Athens, the chief C.I.A. agent there was shot and killed.[23]

Is this type of reporting necessary? What—other than debasing governmental institutions and jeopardizing the life of those associated with them—does a story of this nature bring to the average reader? Probably very little. But, think of the ego gratification a so-called "investigative" reporter had in "exposing" the SYSTEM to another of its weaknesses. I do not mean to suggest that a vigilant press has no duty to expose, when necessary, inherent governmental and socio-political weaknesses. But, when such exposures in the course of their public disclosure threaten national security and mark others as murder victims, then—in those cases—I suggest no valid purpose is served by such news stories.

Several weeks ago, the *Washington Post* reported with glee the story of the C.I.A.'s secret payments of money to King Hussein of Jordan. Another

government secret had been *exposed*; but at what price to our national and international intelligence operations? Investigative reporters have assumed the posture that it is the government's job to keep secrets and the reporter's job to ferret them out.[24]

William Thomas, the editor of the *Los Angeles Times* recently observed, "The one thing the press covers more poorly than anything else is the press. We don't admit our mistakes unless we're virtually forced to under threat of court action or public embarrassment. We make no attempt to explain our problems, our decisions, our fallibilities, our procedures."[25]

V.
The Search for Truth

As was stressed time and again by Milton and John Stuart Mill, TRUTH is discovered only through open discussion. If truth is actually sought, it can only be discerned by open, complete, objective, and accurate investigation of both sides of an issue in controversy. The right to know the truth of any matter neither does, nor should ever be so extended as to encompass matters of personal intimacy which have no conceivable relationship to information which will enable the public to make informed judgments about matters in which they have a truly legitimate interest. The First Amendment to the Federal Constitution should protect the communication of newsworthy information, but not the dissemination of intimate details of one's private life completely unconnected with one's public position or activities.[26]

St. John reminded us very early that Truth makes

us free.[27] But, what is Truth? Truth is commonly understood as that which is in accord with fact; it is in agreement with reality, it allows for eventual verification. Truth is born of openness—from discussion of positive and negative sides of an issue or controversy. It is born amid a full presentation of facts. Unless both sides of a controversy, then, are presented with the parties involved in *both* sides being afforded an opportunity to be present—in whatever forum of disclosure: television, radio, newspaper—truth can never be discerned.[28] Facts may, very simply, be understood as events or actual happenings in time.[29] Now, if facts are presented objectively, a discerning individual should be able to come to an understanding of factually presented matter and—thereby—discover the truth of such a matter under investigation or in controversy.

The United States Supreme Court recently held that the right to know in Virginia extended beyond the territorial jurisdiction of the state. In *Bigelow v. Commonwealth of Virginia,* decided in 1975, the High Court held that an advertisement concerning the availability of abortions in New York could validly be published in *The Virginia Weekly* even though a state statute in Virginia made it a misdemeanor to sell or circulate any publication encouraging, prompting or procuring an abortion. Here, it was determined that the right to know and to be informed of a matter of current social and personal interest was of greater importance than a state policy of protectionism.[30]

Alfred North Whitehead's *Fallacy of Misplaced Concreteness* is readily seen in force and application when the role of the modern press is considered—

for, all too often, information of a dubious nature from an equally dubious source is received by a journalist, concretized in a mis-placed, distorted fashion, and then distributed by the press.

It is equally sad, in day-to-day activities, where a person in authority (administrative or otherwise) decides very presumptiously and in a self-righteous manner, after hearing one side of a problem, that—without any need to explore the other side of the problem—*the truth* has been established and a final resolution necessitated. Scenarios of this type are written in various daily situations. How shocking that because of such one-sided action, misguided half-truths combine with innuendos and unanswered suspicions to literally condemn and reject a person or a viewpoint without that person or his contrary view ever being accorded a forum for airing of the proverbial—yet universally recognized—other side of the primary question. What we lawyers call Due Process, both of a procedural and a substantive nature, is flagrantly violated—and tragically all too often by ourselves. So it is seen, then, that this problem or quest for the truth of any matter in question is often short-circuited by not just the press and media, but far too often by we ourselves in our daily life patterns. Time—and the shortness thereof—should never be tendered by the press, nor by ourselves, as an excuse for not seeking a balanced exposition of facts which in turn can yield truth.

The truth which makes men free is, for the most part, the truth which men prefer not to hear. Indeed, most people prefer to hide from difficult questions. They do not want reminders of troublesome prob-

lems appearing and re-appearing. Yet, the mature, sophisticated person must attempt to meet such questions—whatever the real or social cost may be as a consequence of the confrontation.

As informed citizens, we have the choice to allow the press to not only influence, but shape and direct our thought processes and—thus—characterize our ultimate evaluation and decision of a specific issue. We can demand more of the press or acquiesce in its self-determined and sometimes Messianic view of giving us the stated truth as perceived by the press, itself.

TRUTH is a powerful word if you think about it. No one person, no one institution should be so presumptious as to instruct on what the truth of any issue in dispute is. As noted, truth emerges from a free discussion—a presentation of evidentiary *facts* by *both* sides arguing a point or fact in question in order that challenge and refutation may be accomplished. The press has a special obligation to avoid pronouncements—oblique or otherwise—of what it considers THE TRUTH of any situation; for, if they fail to meet this obligation, they run the risk of developing and fostering what Orwell termed "Group Think" or what can be simply stated as mind control. The press should nuture inquiry, foster debate and challenge its readers to *think*. It cannot be dogmatic.

Independence of thought and action are the true gifts of the Constitution and of free spirited men. Just as the modern parent—coping with a child who has almost magically turned into a grown-up, or an educator or loving friend—all properly motivated — just as they must guard against directing, either force-

fully or impliedly, courses of action taken by others with whom they are concerned (endeavoring as such to prevent injury or promote happiness), so too must the modern press guard against other similar forms of controlling the minds of the citizens under the guise of presenting in one fell, swoop, THE TRUTH—served appetizingly complete with a late evening edition as a bromide. Personal freedom or independence to make a choice—no matter rational or, as the case may be, irrational is the key here.

V.
Conclusion

Section One of the Virginia Bill of Rights declares, "That all men are by nature equally free and independent. . ." Jefferson and Madison, both genuinely independent human beings themselves, tried to imbue an equal sense of freedom and independence in the documents which they drew to charter the new government and—thus—in the people on whom the foundations of the new democracy rested.[31]

Liberty of conscience and freedom of thought were the very touchstones of the new colonial government. I think that both Jefferson and Madison would have no difficulty in subscribing to the First Principle of Justice espoused by the modern jurisprude, John Rawls, namely—that "Each person is to have an equal right to the most extensive total system of basic liberties compatible with a similar system of liberty for all."[32] Viewed in this context, then, justice is fairness and should be within the reach of every citizen.[33]

Peter Zenger's acquittal of charges drawn against

him for seditious libel has—rightly or wrongly—been regarded as a significant milestone in establishing a right to criticize the affairs of government; for, Zenger—himself—has become a romantic symbol of that personal freedom to criticize.[34]

Just as it was an exercise—an expression of personal freedom guaranteed by the First Amendment to the Federal Constitution—for Peter Zenger to print materials in pursuit of his chosen trade, so, too, was it such an expression of personal freedom that led to the founding of Hampden-Sydney College. The achievement of a social structure grounded in civil as well as religious freedom was the goal of Samuel Stanhope Smith, the first President of Hampden-Sydney, together with two of his charter trustees: Patrick Henry and James Madison. The goals of the college and the goals of the nation were, thus, as they are today, the same: to produce a government of good men and good citizens imbued with faith and reason and nutured in a spirit of personal, yet responsible freedom.[35]

Whether we as a country maintain our heritage of freedom is a decision each one of us must make for ourselves. It is at times a burdensome—a demanding—responsibility, but the consequence of losing it because of intellectual passivity is a terrible fate—a fate that Patrick Henry proclaimed could not allow him to continue. In the final analysis our goal as citizens should be the same as that articulated by John Milton in his famous "Areopagitica" delivered in 1644: namely, to seek and maintain not only for ourselves, but for those who follow, liberty to know, to utter, and to argue according to conscience—

above all liberties.

I must acknowledge with thanks two friends who assisted me in gaining a modern perception of the parameters of Freedom: Georgia D. Vaillancourt of Norfolk, Virginia, and Stephen J. Stabler of Pittsburgh, Pennsylvania.

FOOTNOTES

1. V. Buranelli, ed., THE TRIAL OF PETER ZENGER 3-5 (1957). See also, L. Rutherford, JOHN PETER ZENGER, HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS (1904); Price, "Reflections on the Trial of John Peter Zenger," 32 *Journalism Quarterly* 161 (1955).
2. J. Alexander, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL, S.N. Katz, ed., 2 *passim* (1963).
3. L. W. Levy, ed., FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON, xxiii (1966). See generally, C. H. McIlwain, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION (1923); G. A. Billias, SELECTED ESSAYS: LAW AND AUTHORITY IN COLONIAL AMERICA (1965).
4. Levy, *supra* at xxiv.
5. *Id.* at xxv.
6. *Id.*
7. *Id.* at xxvi.
8. *Id.* at xxviii.
9. *Supra*, note 2.
10. See Lovell, "The Reception of Defamation by the Common Law,"
    15 *Vand. L. Rev.* 1051 (1962); A. T. Carter, A HISTORY OF THE ENGLISH COURTS, (6th ed. 1935).
11. W. L. Prosser, THE LAW OF TORTS, Ch. 19 (4th ed. 1971).
12. This whole discussion of defamation has been drawn largely from Prosser—*supra.*

    A line of United States Supreme Court cases—starting with The New York Times v. Sullivan, 84 Sup. Ct. 710 (1964)—establish that in order for a public official to win a libel action he must prove "actual malice"—defined as a showing "with convincing clarity" that the statement complained of was made with knowledge that it was false or with reckless disregard of whether it was false or not. This doctrine was extended in a number of subsequent cases to require public figures, as well as public officials, to prove actual malice. See *Time v. Hill,* 87 Sup. Ct. 534 (1967); *Rosenbloom v. Metromedia, Inc.,* 91 Sup. Ct. 1811 (1971). In *Gertz v. Robert Welch Inc.,* 94 Sup. Ct. 2997 (1974), the

High Court held proof of actual malice would no longer be required in libel cases brought by private individuals involving matters of public interest. Rather, all such a person need prove was some degree of fault (presumably negligence) on the part of the reporter, publisher or broadcaster. *Time, Inc. v. Mary Alice Firestone,* 96 Sup. Ct. 958 (1976) has further confused the area to the point that no one can determine with certainty what the law of libel is in the United States, who is a public figure and when malice must be proved. See also, *Nebraska Press Assoc. v. Stuart,* 96 Sup. Ct. 2791 (1976). See generally, W. A. Hachten, THE SUPREME COURT ON FREEDOM OF THE PRESS (1968).

13. Agar, "Rights and Responsibilities," in FREEDOM OF THE PRESS TODAY at 19 *passim* (H. L. Ickes, ed. 1941).
    See generally, E. Emery, W. Smith, THE PRESS AND AMERICA (1954); Z. Chafee, Jr., GOVERNMENT AND MASS COMMUNICATIONS, vol. 2 (1947).
14. Ingersoll, "A Free Press—For What," in FREEDOM OF THE PRESS TODAY at 140, (H. L. Ickes, ed. 1941).
15. TIME, Mar. 14, 1977, at 79. See Phillips, "A Matter of Privilege—The Economics of the First Amendment," HARPERS, Jan. 1977, at 95.
16. Letter from T. Jefferson to Walter Jones, January 2, 1814, L. W. Levy, ed., FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON at 373 (1966).
17. TIME, Nov. 15, 1976, at 87.
18. Letter from T. Jefferson to Elbridge Gerry, March 29, 1801, in Levy—*supra* note 16 at 359.
19. T. Jefferson, First Inaugural Address, March 4, 1801, differences of opinion should not be taken as differences of principle.
20. D. Shaw, "Newspapers Can Dish It Out, But Can They Take It?" *New York Magazine,* November 15, 1976 at 63, 65.
21. TODAY Show, NBC Television Network, January 21, 1977.
22. Griffith, "Network News: Minstrels and Anchormen," TIME, Dec. 20, 1976 at 69. When newspapers own television stations, serious problems of cross-ownership give rise to equally serious problems of a near total monopolization of ideas disseminated to the public. The Federal Communications Commission is aware of the severity of situations of this nature and is currently conducting divesture hearings.
23. P. Kilborn, "American Newsmen Told to Quit Britain," *N.Y.*

Times, Nov. 17, 1976, col. 1 at A5.

24. Griffith, "Editors Telling Secrets," TIME, Mar. 14, 1977 at 80; T. Bethell, "The Myth of an Adversary Press—Journalist as a Bureaucrat," HARPERS, Jan. 1977, at 33, 40.
25. *Supra* note 20 at 63.
26. Schwartz, "Danger: Pendelum Swinging—Using the Courts to Muzzle the Press," ATLANTIC MONTHLY, Feb. 1977, at 32.
27. 8 St. John 32.
28. There should be a free discussion of both sides. Letter from T. Jefferson to N. G. Dufief, April 19, 1814, in Levy—*supra* note 16 at 375.
29. 11 Oxford Dictionary 435 (1961)
30. 95 Sup. Ct. 2222 (1975)
31. See T. Jefferson, "Notes on Virginia," in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON (A. Koch, W. Peden, eds. 1944).
32. J. Rawls, A THEORY OF JUSTICE 250 (1971).
33. See generally, L. L. Fuller, THE MORALITY OF LAW (1964); J. Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED (1954 ed.)
34. W. O. Douglas, THE RIGHT OF THE PEOPLE 38 (1958). See generally, Smith, "The Development of the Right of Assembly: A Current Socio-Legal Investigation," 9 *William & Mary L. Rev.* 359 (1967).
35. Address, "Time for Beginnings," given by Dr. W. Taylor Reveley, upon the dedication of the Hampden-Sydney College Bicentennial High Altar Frontal at the Washington National Cathedral, Washington, D. C., October 10, 1977.